

### **Remarks**

This Amendment is responsive to the Office Action mailed November 16, 2004. Claims 13, 32 and 33 have been canceled. Claims 41 and 43 have been placed into independent form.

### **Allowable Subject Matter**

Claims 41-44 were deemed allowable if rewritten in independent form including the limitations of the base claims and intervening claims. Claims 41 and 43 have been placed into independent form and are in condition for allowance. Claims 42 and 44 depend from claims 41 and 43, respectively and are also in condition for allowance. Claims 2, 5, 7, 35, 36 and 37 were amended to depend from claim 41 and are also in condition for allowance. Similarly, claims 28, 29, 31, 38, 39 and 40 were amended to depend from claim 43 and are also in condition for allowance.

### **35 USC § 103 Rejections**

Claims 1-2, 5-7, 9, 13 and 27-33 and 35-40 were rejected under 35 USC § 103(a) as being unpatentable over Küspert, et al. (U.S. Patent No. 5,810,339) (Küspert) in view of Besonen, et al. (U.S. Patent No. 5,307,753) (Besonen).

The Examiner stated that Küspert teaches the use of a counterbalance having a protective housing (22, 23) with a first end/tube (22) attached to a tailgate (12) and a second end/tube (23) attached to the vehicle body (10); wherein when the counterbalance is in a fully extended position, the protective housing is oriented at an angle between the tailgate and the vehicle body (Figure 1) and wherein the counterbalance is in the fully retracted position, the protective housing is oriented in a vertical position with respect to the vehicle body and the tailgate. The Examiner acknowledged that Küspert lacks the specific counterbalance claimed.

Besonen was stated to provide a counterbalance capable of use on a tailgate or a motor vehicle which at least partially controls a load applied to the counterbalance. The counterbalance was stated to have an elastic element (30) that at least partially counters the load; a flexible extension limiter (25) that provides

a stop which defines a fully extended position of the counterbalance and which counters loads applied to the counterbalance after the counterbalance is in the fully extended position.

The Examiner acknowledged that Besonen lacks the specific teaching of using the counterbalance in conjunction with a tailgate.

The Examiner concluded that it would have been obvious to one of ordinary skill in the art at the time of the invention to have provided the tailgate as taught by Küspert with a counterbalance of Besonen in order to control the movement of the gate during opening and closing.

Claims 13, 32 and 33 have been canceled.

Claims 1 and 27 have each been amended to add the limitation of the protective housing having first and second members, where the second member is slidably received by the first member and has a projection which forms a gap between the members. As acknowledged by the Examiner, neither Küspert nor Besonen teach a protective housing with slidable members, one of which having projections to form a gap therebetween. Accordingly, claims 1 and 27 are in condition for allowance.

As previously discussed, claims 2, 5-7, 9 and 35-37 each depend from amended claim 41 and claims 28-31 and 38-40 each depend from amended claim 43 and accordingly are in condition for allowance.

**Conclusion**

In view of the above arguments and comments presented, it is respectfully submitted that all pending claims are patentably distinct and unobvious over the art of record.

Allowance of all claims and early notice to that effect is respectfully requested.

Respectfully submitted,

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2/3/05

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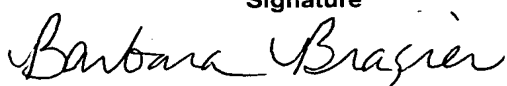
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**CERTIFICATE OF MAILING**

I certify that this **Amendment After Final Rejection** is being

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